FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5629 OF 2005

Office notes, office Memoranda of appearances, Court's orders or directions & Registrar's orders.	Coram, : Court's or Judge's Orders : .

Mr. V. A. Gangal for the petitioner

Ms. Mukund Pargaonkar and Mr. Phiroz Colabawala for respondents

CORAM: SMT. RANJANA DESAI, J.
14/9/2005

P.C.:-

The petitioner is the original defendant in R.C.S. No. 49/94. The suit was filed by the respondent plaintiff initially for injunction simplicitor, thereafter the plaint was amended and the prayer of mandatory injunction was added.

2. The trial court dismissed the suit on 15/4/2003. The respondent filed an appeal being Civil Appeal No. 82/02 in the court of District Judge Raigad. The said' appeal was allowed on 7/3/2005. The operative part of

the order reads as under:-

"1) Appeal is allowed.

2) The order of learned trial court is quashed and set aside.

3) The deft. is directed to remove the encroachment committed by the deft. (as shown on map (Exh.-98)) by erecting iron poles and barbed wire fencing on suit plot.

4) The deft. is restrained by perpetual injunction, not to make encroachment on suit plot by himself or through his agent, and also restrained from causing any kind of damage to the fencing and from causing disturbance to the enjoyment and possession of plaintiff.

5) The map (Ex. 98) be treated as part and parcel of decree.

6) Parties to bear their own costs.

7) A decree be drawn up accordingly".

3. The petitioner challenged this order by preferring a Second Appeal in this court. On 9/6/2005 this Court dismissed the Second Appeal.

4. The respondent filed Regular Darkhast No. 6/05 before the executing court. The petitioner filed an application under Section 47 of the Code of Civil Procedure ("Code" for short) objecting to the execution proceedings on the ground that the decree passed by the lower appellate court is not executable. The said application came to be rejected on 1/8/05 and possession warrant came to be issued under Order 21 Rule 35(1) of the Code. That order is challenged in this writ petition.

5. I have heard the learned counsel appearing for the petitioner at great length. He has drawn my attention to the prayers (a) and (aa) of the plaint. He has contended that

prayers (a) and (aa) are confined only to the removal of the encroachment and for perpetual injunction. The suit is not filed for possession and no stamp duty is paid for that relief. The learned counsel urged that in the circumstances that the lower appellate court could not have issued the possession warrant because a decree cannot frustrate the relief that is claimed by the plaintiff in the suit. He contended that the relief that is granted by the lower appellate court and which is confirmed by the High Court is only in respect of removal of encroachment. This relief can be made available to the respondent by merely removing the encroachment and maintaining the order of permanent injunction. He submitted that in the circumstances the impugned order issuing warrant of possession must be set aside.

6. In my opinion, no interference is necessary with the impugned order.

7. I have already quoted the

operative part of the order passed by the lower appellate court. The lower appellate court has directed the defendant to remove the encroachment committed by the defendant as shown in Exhibit 98 by erecting iron poles and barbed wire fencing on the said plot and it has also restrained the defendant by perpetual injunction from making any encroachment on suit plot by himself or through his agent and also restrained him from causing any kind of damage to the fencing and from causing disturbance to the enjoyment and possession of the plaintiff. The map Exh. 98 is ordered to be treated as part and parcel of the decree. Undoubtedly it will be the duty of the executing court to ensure that the decree is executed.

8. It is true that the defendant is directed to remove encroachment committed by him by erecting irone poles and barbed wire fencing but the further direction given by the lower appellate court is also very relevant. It has restrained the defendant from

making any encroachment and disturbing the enjoyment and possession of the plaintiff. Implicit in all this is the protection of possession of the plaintiff. The High Court has confirmed this decree. Therefore, while ensuring that the decree is executed and the encroachment is removed, the executing court will be entitled to take such steps as are necessary to secure that end. Surely if the encroachment is to be removed and the possession of the plaintiff is not to be disturbed the defendant cannot insist on squatting on the land of the plaintiff.

9. My attention is rightly drawn by learned counsel for the respondents to the observations of the Supreme Court in Pratibha Singh & Anr. v. Shanti Devi Prasad & Anr., AIR 2003 SC 643. In that case the suit for specific performance was decreed. There was no map of the suit property. While considering the question of execution of the decree the Supreme Court observed that after all a

successive plaintiff should not be deprived of the fruits of the decree. The Supreme Court further observed that a decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission.

10. Undoubtedly these observations are in the facts of the case before the Supreme Court but the principle is that the executing court can take such steps as may be necessary to ensure that the decree is executed and an accidental omission in the decree should not be allowed to defeat it. In this case the map forms part of the decree. My attention is drawn by thelearned counsel for the respondents to order dated 6/5/05 whereby the executing court has appointed TILR as court commissioner to execute the orders of the court on payment of commissioner’s fees. Needless to say that TILR will take necessary steps to execute the decree on the basis of map Exh. 98 which forms part of the decree and ensure

that the decree is executed. Successful plaintiff has to get the fruits of his decree. The petitioner cannot defeat the decree by asking the court to adopt a hypertechnical approach and by contending that the poles may be removed but possession warrant can not be issued. In effect what is tried to be suggested is that the defendant shall suat on the land of the plaintiff though by the decree he is restrained from causing disturbance to the enjoyment and possession of the plaintiff and thus make decree unexecutable.

11. I am not inclined to take such hypertechnical approach. Writ Petition is rejected.

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